Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSEPH N. MARCAL, III,

Appellant,

vs.

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of
The State of Louisiana

JURISDICTIONAL STATEMENT

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether Article 5, Section 5(C) of the Louisiana Constitution of 1974, which provides that the appellate jurisdiction of the Supreme Court of Louisiana is limited to questions of law, may be applied to bar review of the sufficiency of the evidence under the standard announced by this Court in Jackson v. Virginia, 443 U.S. 307 (1979), viz., "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," without violating the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether the evidence presented at the trial of this case was sufficient for any rational trier of fact to have

found the essential elements of the crime beyond a reasonable doubt when the defendant was charged with two counts of public bribery of the same employee, once by check and once in cash, the witnesses to the alleged cash transaction were the same as the witnesses to the alleged check transaction, and bank records refute the alleged check transaction?

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JURISDICTIONAL STATEMENT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Joseph N. Marcal, III, appearing herein through his undersigned counsel, respectfully submits that this case is properly an appeal from the Supreme Court of Louisiana and not a matter invoking the discretionary remedy available on application for a writ of certiorari. In the alternative only, appellant prays these pleadings be treated as an application for a writ of certiorari and that this Court exercise its discretion to review the substantial questions of Constitutional Law presented by this case and to reverse the unjust determination by the Courts of the State of Louisiana that the appellant is guilty of the crime of public bribery. In support of this Court's jurisdiction, appellate or by writ of certiorari, appellant respect-

fully shows:

OPINIONS BELOW

The Opinion of the Louisiana Supreme Court which was originally rendered in this case on January 28, 1980, as yet unreported, is reproduced herein at Appendix A, p. A-1, post.

The Opinion of the Louisiana Supreme Court on Rehearing of this appeal, rendered in these proceedings on June 23, 1980, also unreported at this time, is reproduced herein at Appendix B, p. A-9, post.

There were no relevant written opinions of the Trial Court in this matter.

GROUNDS ON WHICH THE APPELLATE JURISDICTION OF THIS COURT IS INVOKED

This is an appeal from a judgment of conviction in a criminal case arising in

the Criminal District Court for the Parish of Orleans, State of Louisiana. Appellant, an attorney, was convicted of two counts of committing public bribery, in violation of La.R.S. 14:118, following a trial to a judge sitting without a jury. Appellant waived trial by jury.

The original opinion of the Supreme Court of Louisiana was rendered on January 28, 1980. Appendix A, p. A-1, post.

The Louisiana Supreme Court thereafter granted rehearing of this appeal and on June 23, 1980, it again affirmed appellant's conviction and reinstated its original opinion. Appendix B, p. A-9, post.

The notice of appeal from the judgment and opinions of the Supreme Court of Louisiana was timely filed in the Louis-

iana Supreme Court on September 19, 1980, and is reproduced herein at Appendix C, p. A-14, post.

The mandate of the Louisiana Supreme Court was recalled and stayed after the appellant's conviction was reaffirmed on rehearing pending the timely filing of this Jurisdictional Statement on Appeal. That stay has since expired and a rule nisi is pending, ordering appellant to show cause why the judgment of the trial court should not be made executory.

The statute conferring appellate jurisdiction on this Court to review the judgment below is 28 U.S.C. 1257(2).

Appellant raised the issue of the unconstitutionality of Article 5, Section 5(C) of the Louisiana Constitution of 1974, after the Supreme Court of Louisi-

ana refused to review the sufficiency of the evidence on direct appeal in accordance with the standards of this Court's holding in Jackson v. Virginia, 443 U.S. 307 (1979). The Louisiana Supreme Court did not cite the said State Constitutional provision as authority for its refusal to review the sufficiency of the evidence on the constitutional standards imposed by this Court but it did state that its jurisdiction is "limited to questions of law; therefore, if there is some evidence proving the essential elements of the crime, no question of law is presented, sufficiency of the evidence being a matter to be decided by the trier of fact." Appendix A, p. A-4, post. That constitutes a direct application of Article 5, Section 5(C), Louisiana Con-

stitution of 1974 in violation of Jackson v. Virginia, supra.

On rehearing, notwithstanding that appellant had raised the issue of the unconstitutionality of Art. 5, Sec. 5(C), La. Const. 1974, if it is used as a basis to bar the type of review constitutionally mandated under Jackson v. Virginia, supra, the Court did not expressly deal with that issue. Instead, it merely said "Our original opinion is reinstated, and the conviction and sentence of the defendant are affirmed." Appendix B, p. A-13, post.

The fact that the Louisiana Supreme Court did not expressly cite Article 5, Section 5(C), of the State Constitution, although it did expressly apply its provisions which limit the jurisdiction of

that Court to questions of law alone, does not prevent review by this Court of the Federal Constitutional question raised on rehearing by the appellant. The Court necessarily reached the merits of the question, whether it discussed it or not in the opinion, by affirming the judgment without applying the constitutional standards for appellate review of the sufficiency of the evidence when the constitutional standard was pointed out to Court below and it was urged that, if Artcle 5, Section 5(C) of the State Constitution was construed to be a bar to rew of the sufficiency of the evidence to meet the minimal constitutional standard enunciated in Jackson v. Virginia, supra, the State constitutional provision would violate Federal constitutional due pro-

cess. In such cases where the Court below has ignored an attack upon the constitutionality of a statute the constitutionality of which must be upheld in order to reach the decision made by the lower court, this Court has held that it has jurisdiction on appeal. Radio Station WOW v. Johnson, 326 U.S. 120, 129 (1945); Neilson v. Lagow, 12 How. (53 U.S.) 98, 109-111 (1851). The holding that Article 5, Section 5(C) is constitutional is implicit in the judgment affirming the conviction without application of the standard under Jackson, which is contrary to that of the State constitutional provision.

Since the constitutionality of Article 5, Section 5(C), Louisiana Constitution of 1974, was attacked in the Court

below, it cannot be said that the application of that State constitutional standard constitutes an "independent and adequate non-federal ground of decision." The constitutionality of the State provision barring the type of review mandated by this Court in Jackson v. Virginia is a federal question of great substance.

Clearly, this Court has jurisdiction of this case under its appellate jurisdiction. 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, in its Due Process Clause, provides:

> nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *.

Article 5, Section 5(C), Louisiana Constitution of 1974, relative to the scope of review in criminal cases by the Supreme Court of Louisiana, provides in relevant part:

> * * * In criminal matters, its (the Louisiana Supreme Court's) appellate jurisdiction extends only to questions of law.

Title 14, Section 118(1), Louisiana Revised Statutes of 1950, provides:

> Public bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any of the following persons, with the intent to influence his conduct in relation to his position, employment or duty:
>
> (1) Public officer or public employee; * * *.

STATEMENT OF THE CASE

Appellant, an attorney, was convicted after a bench trial of two counts of public bribery in violation of La.R.S.

14:118(1). He was sentenced to one year at hard labor on each count, the sentences to run concurrently.

The first count of the indictment alleged that on or about March 20, 1975, appellant paid Mrs. Dorothy Boyd, a Deputy Clerk of the Criminal District Court for the Parish of Orleans, two hundred dollars ($200.00) in cash to assign one of his cases to a particular section of the said court. The second count alleged that an identical offense occurred on May 16, 1975, and that appellant gave Mrs. Boyd a check for the same amount on that occasion.

Mrs. Boyd testified, under a grant of immunity, that she had assigned the cases as Mr. Marcal requested and that he paid her in the manner alleged in the

indictment. She described the check she allegedly received with regard to the second count of the indictment in a manner which coincided with the appearance of appellant's checks for his "Attorney at Law" account. Her testimony was corroborated by appellant's former legal secretary, Susan Beatty, and a lawyer who had formerly leased office space in appellant's building.

Appellant's former secretary, Susan Beatty, testified that on the day of the alleged cash transaction with Mrs. Boyd, appellant had taken two hundred dollars from his law office. She claimed that appellant later claimed he had used the money to bribe Mrs. Boyd. Mrs. Beatty testified that on May 16, 1975, apellant asked her to stay late to give Mrs. Boyd

an envelope. Mrs. Beatty testified that she opened the envelope to see if it contained anything she should not leave in the window of the office in order to determine whether it was necessary for her to actually wait and give the envelope to Mrs. Boyd. When she opened the envelope, she saw a two hundred dollar ($200.00) check drawn on appellant's "Attorney at Law" account and made payable to Dorothy Boyd. She further testified that she gave the envelope to Mrs. Boyd when Mrs. Boyd came to the office near 5:00 o'clock P.M. on May 16, 1975.

Appellant's former lessor, an attorney named Henry Mitchell, testified that appellant often boasted that he could have cases assigned to a particular section of the Criminal District Court.

He also testified that he witnessed the May 16th transfer of the check to Dorothy Boyd by Mrs. Beatty.

In his defense, appellant testified that the alleged bribery transactions never occurred. He produced all of his checks and bank statements for the period immediately preceding the alleged check transaction and for a substantial period thereafter. All checks were accountable and none of them were written to Mrs. Boyd. While the State had served a subpoena on the bank at which appellant maintained all of his checking accounts and it served another subpoena at the bank at which Dorothy Boyd claimed she had cashed appellant's check which had allegedly been given to her by Mrs. Beatty, there was no check found to sup-

port the alleged transaction. Mrs. Boyd testified that the check had not been returned to her unpaid by appellant's bank. There was no such transaction reflected on appellant's bank statement for the relevant period or any subsequent statement, several of which were offered to disprove that the check transaction occurred and thereby to also show that Dorothy Boyd was lying about the alleged cash transaction.

After the Trial Court entered its judgment in these proceedings, appellant filed a motion for a new trial on the ground that the verdict or judgment did not conform to the law and evidence, viz., the evidence was insufficient to establish appellant's guilt beyond a reasonable doubt of either of the trans-

actions because the check transaction was thoroughly disproved by documentary evidence which was irrefutable and because, the witnesses having thus been shown to have been incredible, no rational trier of fact could have reasonably placed any confidence in the testimony from those same sources to determine the appellant's guilt on the cash transaction. The Trial Court, without any written or verbal opinion stating the reasons it found appellant to be guilty of the charges made, denied the motion for a new trial. The Louisiana Supreme Court rejected appellant's contention that the Due Process Clause, as construed in Jackson v. Virginia, supra, required it to assess the evidence under the standard of appellate review enunciated in Jackson and

held that the jurisprudence under Article 5, Section 5(C), La. Const. 1974, limited its jurisdiction on appellate review to the determination whether there was "some" evidence on each essential element of the alleged offenses, a different form of the "no evidence" test condemned by this Court in Jackson v. Virginia, supra; Pilon v. Bordenkirscher, 444 U.S. 1, 100 S.Ct. 7, 8 (1979). The Court below disregarded appellant's challenge to the constitutionality in view of Jackson's mandate of Article 5, Section 5(C), La. Const. 1974, and refused to review this case under the proper constitutional standard.

REASONS WHY FEDERAL QUESTIONS ARE SUBSTANTIAL

In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 2789 (1979), this

Court held that the "no evidence" test of Thompson v. City of Louisville, 362 U.S. 199 (1960), was constitutionally inadequate to assure compliance with the reasonable doubt standard of guilt which is required by due process under this Court's decision in In re Winship, 397 U.S. 358, 364 (1970). The Louisiana Supreme Court in this case declined to review appellant's assignment of error that the evidence is insufficient to sustain the verdict of the trial court because that "Court's jurisdiction is limited to questions of law; therefore, if there is some evidence proving the essential elements of the crime, no question of law is presented, sufficiency of the evidence being a matter to be decided by the trier of fact. It follows

that on review of a denial of a motion for a new trial, this Court will not review the sufficiency of the evidence presented to the trial court but will simply determine if there is some evidence of each element." This is a mere formulation of the "no evidence" test. In Pilon v. Bordenkircher, 444 U.S. 1, 100 S.Ct. 7, 8 (1979), applying Jackson v. Virginia, supra, retroactively, this Court repeated the holding of Jackson "that the Thompson 'no evidence" test is constitutionally inadequate in a case such as this."

The proper standard for appellate review, under the Fifth or Fourteenth Amendment Due Process Clauses, is:

> whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt.

When the Thompson case was decided by this Court, Article 7, Section 10 of the Louisiana Constitution of 1921 was in force. That provision was identical to the present Article 5, Section 5(C) of the Louisiana Constitution of 1974. Significantly, as the opinion in the present case declares, the "no evidence" test was regarded to be a legal standard, hence presented a legal question in a case in which there was no evidence of a particular essential element. For some unexplained, and we submit unexplainable, reason, when this Court announced the test in Jackson v. Virginia, supra, the Louisiana Supreme Court did not treat that standard as presenting a question of law but one of fact, hence an issue over

which it had no jurisdiction. We recognize that this Court is not empowered to interpret Article 5, Section 5(C) to hold that it fixes a legal standard over which the Louisiana Supreme Court has jurisdiction. That is a matter of State law which this Court must accept from the State Supreme Court. Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964). This Court, however, is obligated under Article VI, cl. 2 of the United States Constitution to enforce due process standards upon the Louisiana Supreme Court. The Jackson standard being required by due process and the Louisiana Supreme Court holding that the State Constitution bars it from according appellant the type of review required by due process, something must give. Under

Article 6, cl. 2, U.S. Const., it is the State Constitution which must always give way to the Federal Constitution's due process requirements. Therefore, Article 5, Section 5(C), Louisiana Constitution of 1974, is and must be declared to be unconstitutional.

The evidence in this case was clearly inadequate for any rational trier of fact to have concluded it to be sufficient to prove defendant's guilt beyond a reasonable doubt. Jackson v. Virginia, supra.

Appellant was accused of bribing Dorothy Boyd, a Deputy Clerk of the Criminal District Court for the Parish of Orleans, to allot cases for appellant to Section C of that Court. Dorothy Boyd and Susan Beatty furnished the only evi-

dence of the offense charged in Count I--the cash transaction. Those two witnesses, corroborated by an attorney with whom appellant had a dispute over money, furnished the only evidence on the check transaction. Their testimony, if a rational trier of fact could accept it as being true, sustained the State's burden to prove guilt beyond a reasonable doubt. But their testimony is refuted by the existing documentary evidence, hence it was irrational for the trial judge to have accepted it as being true.

Appellant produced not only his cancelled checks but the bank statements on the account his secretary testified was the account on which the alleged check was drawn. Dorothy Boyd did not know the name of the account but de-

scribed a check which was identical in appearance to the checks appellant offered in evidence. The checks were all accounted for by number. It was suggested the check might have been written out of order. The problem with such speculation, however, is that the check would still have been presented to the bank for payment and reflected on the appellant's bank statements. Even if that check had overdrawn the account and subsequently returned to the bank which cashed the check for Dorothy Boyd, as she testified, that transaction would have shown up on the bank statements. It does not. Dorothy Boyd testified that she presented the check at her bank, it was cashed by her bank and she never was notified by her bank that the check had

not been paid. Obviously, had she presented a check to the bank which was not paid, she would have been notified. If she presented a check which was paid by her bank, it would have shown up on appellant's bank statements, whether or not appellant's bank subsequently honored or returned the alleged check. Appellant introduced the statements from the date of the alleged check transaction until several months later. All checks in the amount of $200.00 were accounted for and none of them were made payable to or endorsed by Dorothy Boyd.

Clearly, the check transaction did not occur.

Since the witnesses obviously committed perjury on the check transaction alleged against the appellant, it would

be unreasonable and irrational to accept their testimony as being true on the cash transaction.

The State failed to prove the appellant's guilt, even when the evidence is viewed in the light most favorable to the Government. Such positive proof of the non-existence of the check--the absence of any bookkeeping entry on appellant's bank records--clearly requires the determination not only that the State failed to prove appellant's guilt but that he is innocent of the charges made against him.

CONCLUSION

For the foregoing reasons, the federal questions are substantial. This case presenting an issue within the Court's appellate jurisdiction, this

Court should place this matter on the Appellate Docket and grant full plenary consideration of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Irvin Dymond, Attorney for Appellant and a Member of the Bar of the Supreme Court of the United States, certify that a copy of the foregoing Jurisdictional Statement on Appeal to the Supreme Court of the United States has been served upon opposing counsel by United States Mail, first class postage prepaid, by depositing same in the United States Mail at a receptacle therefor provided at the First National Bank of Commerce Building, New Orleans, Louisiana 70112, the envelope bearing the following directions for delivery to opposing counsel:

Hon. William Guste
Attorney General of Louisiana
Attn: Criminal Division
Suite 700
2-3-4 Loyola Building
New Orleans, LA 70112

this 7th day of November, 1980.

All parties required to be served have been served.

F. IRVIN DYMOND
Attorney of Record for
Appellant Marcal